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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FREDERICK GLENN ALLEN, Defendant and Appellant.	B192567 (Los Angeles County Super. Ct. No. VA092948)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael A. Cowell, Judge. Affirmed.

Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

Frederick Glenn Allen appeals from the judgment entered following his convictions by jury on three counts of criminal threats (Pen. Code, § 422 – counts 1, 3, & 4) and count 7 – intentional violation of a court order (Pen. Code, § 273.6, subd. (a)). The court sentenced appellant to prison for four years four months. Appellant claims the trial court committed trial and sentencing errors. We affirm the judgment.

FACTUAL SUMMARY

1. *People's Evidence.*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that as of the time of the trial, May 2006, Christina A. and appellant had been married for 11 years. In November 2003, the Orange County Superior Court issued a protective order in favor of Christina A. and against appellant pursuant to Penal Code sections 136.2 and 1203.097, subdivision (a)(2). The order prohibited appellant from contacting Christina A., and was to remain effective until November 2006. The order provided that appellant must have "no . . . written contact with . . . [Christina A.]," and "no contact with [Christina A.] . . . through a third party, except an attorney of record."

In February 2004, Christina A. filed for separation and later for divorce. In October 2005, appellant pled no contest to inflicting corporal injury, the court placed appellant on probation, and one of his probation conditions was that he stay away from Christina A.

As to count 1, Christina A. testified that on November 18, 2005, she received at her home a letter from appellant. She was not living with appellant at the time. Christina A. opened and read the letter. The names of appellant's four children were on the letter.

People's exhibit No. 1 was an envelope and letter introduced into evidence. The addressor on the envelope was Fred Allen. The addressees on the envelope were "The [¶] ALLENS[.] [¶] C.A.[,] E.A.[,] N.A.[,] and my Little [F.A.'s]." (The persons whose initials we have provided were appellant's children.) The letter was the one Christina A. read. We have italicized below for later discussion certain portions of the letter.

The front of the letter read: "Dear C.A.[,] E.A.[,] F.A.[,] N.A.[:] [¶] How come I haven't received a letter? *Tell Momma* does she want to get lost with Pat and [Cynthia]. *She's making me loose [sic] my self control!* You kids write me a letter to *make me calm down*. I'll write you kids, but you should write me back. Don't listen to your mother - write me. *Her soul right now is dependent on it. . . . I will always go ill if a woman tries [to] keep me from my children*. C.A.[,] E.A.[,] F.A.[,] N.A.[,] I love you all. I never left you kids! *[Momma]* [threw] Daddy out! [F]or the next 8-17 years I will tell all you kids this! So *even if your mom does not let you kids read my letter, I will be out there again. Hopefully your mom will realize its safer to keep me a happy person before I get released! If not there will be [a lot] of trauma, foster care, orphanages, police, [h]omicide [detectives], morgues, funerals coming!*"

On the back of the letter, the following words were printed: "*I'VE LOST MY MIND* – BUT I HAVE HOPE YOU [C.A.], [E.A.], [F.A.], [N.A.,] YOUR FOUR HEARTS CAN *FIX ME BEFORE I GET RELEASED!*"

"C.A.[,] E.A.[,] F.A.[,] N.A.[,] rest assured I'll never hurt *you kids*! I only want you all back in my life! *No other man will live* playing daddy to you kids. *I'll put that on my death!* No man – you're my kids. *I'd like to call so tell [psycho]*[1] *momma to take call block off. She can run but, never hide in southern California.* Even if she *marries a pig cop*! *He'll X too*.[2] *I'm so [damn] angry* kids. *You kids can't imagine how angry it makes me* not to hear from you's 4. Please write me! *I don't want to be angry when I get out!*" Appellant, in printed words, indicated he loved his children. He then wrote: "*Pls tell momma JUST WAIT TILL [I'M] FREE YOU WILL SEE HATE AND MEET EVIL[,] NOTHING SEPARATES ME FROM MY BABIES[.] [¶] NO FLESH!* B[.]"

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1 The actual word appellant wrote here appears to have been "cyco."

2 We note X may be used as a verb, one meaning of which is "To obliterate (a typewritten character) by typing 'x' over it; to cross *out* in this way; = ex *v.* Also *fig.*" (Oxford English Dict. Online http://www.oed.com/ [as of September 2008].)

Later, after telling C.A. to hug N.A., kiss F.A., and hug E.A., appellant wrote, "and tell yourself my DahDah loves me very much [a]nd he'll be — with me again soon! *C.A. till death do us all 5 apart!*" [3] (Italics added.)

Christina A. testified as follows. Christina A. felt threatened after she read the beginning of the letter, and was terrified after she read the entire letter. She took the letter as a threat because of her past experience with appellant's violence and anger. Christina A. testified that she had been very afraid of appellant.

During cross-examination, Christina A. testified as follows. Christina A., and not her children, received the letter. Christina A. did not let them read it. She reported the letter to police on November 30, 2005. Appellant wrote the children four or five other letters which, after she read them, Christina A. gave to the children. Appellant wrote other letters which Christina A. did not give to the children.

The evidence established that on December 2, 2005, appellant intentionally violated a court order (count 7),[4] and twice on December 16, 2005, he committed the offense of criminal threats against Christina A. (counts 3 & 4).

2. *Defense Evidence.*

In defense as to count 1, appellant testified as follows. In October 2005, he pled no contest to a domestic violence offense, but only because he was coerced by the court in that matter. One of his probation conditions was that he stay away from Christina A. However, appellant also testified that he did not remember if the court at the time told him that he was to stay away from Christina A.; he had been upset when the court imposed the order. Appellant received the November 2003 protective order. The order directed appellant not to contact Christina A., except through an attorney of record.

According to appellant, Christina A. was with appellant's old drinking buddy, Raul Mejia. Appellant was happy because Christina A. and Mejia belonged together and

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[3] These words were printed.

[4] There is no dispute as to counts 3 and 4. We will discuss appellant's sufficiency challenge to count 7 later.

both used methamphetamine. Appellant was upset because of the living conditions of his children.

In November 2005, appellant was incarcerated. He sent the previously mentioned letter to his grandmother's house, where Christina A. and his children lived, and where appellant had lived before he was incarcerated. Appellant's grandmother was deceased when he sent the letter.

Appellant recognized the handwriting on the front of the letter, and somewhat recognized the writing on the back of the letter. Appellant wrote the portions on the back of the letter which said he loved his children. Appellant recognized the printed portions on the back of the letter. However, he also testified that only some of those portions looked familiar. Appellant did not recognize the writing which said, "She's making me loose [*sic*] my self control! You kids write me a letter . . . ." Appellant did not write the portion of the letter which said "'*JUST WAIT UNTIL I'M FREE. YOU WILL SEE HATE, EVIL. NOTHING SEPARATES ME FROM MY BABIES.*'"

Appellant did not remember writing the references to foster care, orphanages, police, homicide detectives, morgues, or funerals, and did not remember writing the references to running and hiding. Appellant sent about six letters to C.A. and E.A., who were 10 and 7 years old, respectively, and were old enough to read. According to appellant, Christina A.'s personality changed after he married her. Appellant did not like what she did, and her present affair with Mejia was not her first.

CONTENTIONS

Appellant claims (1) there was insufficient evidence supporting his conviction on count 1, (2) the trial court failed to instruct on an element as to count 1, (3) there is insufficient evidence supporting his conviction on count 7, and (4) the trial court committed *Cunningham* error by imposing the upper term on count 1.

DISCUSSION

1. *Sufficient Evidence Supported Appellant's Conviction on Count 1.*

Appellant claims there was insufficient evidence supporting his conviction for criminal threats (count 1). We disagree. Penal Code section 422, states, in relevant part, "[a]ny person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished . . . ."

In *People v. Toledo* (2001) 26 Cal.4th 221 (*Toledo*), our Supreme Court stated, "In order to prove a violation of [Penal Code] section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat -- which may be 'made verbally, in writing, or by means of an electronic communication device' -- was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances. [Citation.]" (*Id.* at pp. 227-228.) Fear is "sustained" for purposes of the section when it is for a period of time that extends beyond what is momentary, fleeting, or transitory. (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.)

As the court observed in the case of *In re Ryan D.* (2002) 100 Cal.App.4th 854 (*Ryan D.*), "the statute 'was not enacted to punish emotional outbursts, it targets only those who try to instill fear in others.' (*People v. Felix* (2001) 92 Cal.App.4th 905, 913.) In other words, [Penal Code] section 422 does not punish such things as 'mere angry utterances or ranting soliloquies, however violent.' [Citation.]" (*Ryan D.*, *supra*, 100 Cal.App.4th at p. 861.)

Moreover, "the determination whether a defendant intended his words to be taken as a threat, and whether the words were sufficiently unequivocal, unconditional, immediate and specific [that] they conveyed to the victim an immediacy of purpose and immediate prospect of execution of the threat can be based on all the surrounding circumstances and not just on the words alone. The parties' history can also be considered as one of the relevant circumstances." (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340, bracketed material added.)

Further, as the court observed in *Ryan D.*, "Section 422 does not require that a threat be personally communicated to the victim by the person who makes the threat. (*In re David L.* (1991) 234 Cal.App.3d 1655, 1659.) . . . Accordingly, where the accused did not personally communicate a threat to the victim, it must be shown that he specifically intended that the threat be conveyed to the victim. (*People v. Felix*, *supra*, 92 Cal.App.4th at p. 913; *In re David L.*, *supra*, 234 Cal.App.3d at p. 1659.)" (*Ryan D.*, *supra*, 100 Cal.App.4th at p. 861.) "Where the threat is conveyed through a third party intermediary, the specific intent element of the statute is implicated. Thus, if the threatener intended the threat to be taken seriously by the victim, he must necessarily have intended it to be conveyed." (*In re David L.*, *supra*, 234 Cal.App.3d at p. 1659.)

In the present case, there is no dispute that appellant's letter contained threats as that term is used in common parlance. Nor is there any need to parse the letter. Simply put, the jury reasonably could have concluded from all of the facts, including the letter, that, in the letter, appellant was threatening to kill Christina A. (if not others as well) when his incarceration ended. Moreover, the jury reasonably could have concluded that appellant intended Christina A. to take his statements as threats by having her read the

letter and/or having its contents conveyed to her by her children. Indeed, the jury reasonably might have concluded that his addressing the envelope and letter to the children was a ruse, and that appellant always had intended Christina A. to read the letter.

Further, the jury reasonably could have concluded that the threats were "so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby cause[] that person reasonably to be in sustained fear for . . . her own safety or for . . . her immediate family's safety" within the meaning of Penal Code section 422. The fact, if true, that at the time appellant wrote the letter, he was incarcerated and not scheduled for release for another two months, does not compel a contrary conclusion. Christina A. was terrified when she read the letter, and the jury reasonably could have concluded her fear was sustained at least until November 30, 2005, when she reported the letter to police, and that her fear was reasonable. The charged offenses of counts 3 and 4, which are not in dispute, were probative of appellant's state of mind as to count 1.

We conclude there was sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, that appellant, by sending the letter which Christina A. read, committed the crime of criminal threats (count 1). (Cf. *People v. Ochoa, supra*, 6 Cal.4th at p. 1206, *People v. Gaut* (2002) 95 Cal.App.4th 1425, 1427-1432; *People v. Mendoza, supra*, 59 Cal.App.4th at p. 1340; *People v. Garrett* (1994) 30 Cal.App.4th 962, 967; Pen. Code, § 422.)

2. *The Court Did Not Reversibly Err by Failing to Instruct on an Element of Count 1.*

In the present case, the trial court gave the jury without objection CALJIC No. 9.94, pertaining to criminal threats.[5] The instruction indicated the second enumerated

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[5] That instruction read: "Defendant is accused [in Count[s]] of having violated § 422 of the Penal Code, a crime. [¶] Every person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which threat, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person

element of the offense was "The person who made the threat did so with the specific intent that the statement be taken as a threat." The instruction did not state that the jury was required to determine whether appellant intended the children to convey the threats to Christina A.[6]

Appellant claims the trial court erroneously failed to instruct that an element of the offense of criminal threats was that appellant had to intend the children to convey the

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threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for her own safety or for her immediate family's safety, is guilty of a violation of Penal Code § 422, a crime. [¶] 'Great bodily injury' means significant or substantial bodily injury or damage. If it does not refer to trivial, insignificant, or moderate injury or harm. [*Sic*.] [¶] 'Immediate family' means any spouse, whether by marriage or not, parent, child, . . . or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household. [¶] 'Electronic communication device' includes, but is not limited to, telephones and cellular telephones[.] [¶] The term 'sustained fear' means a period of time that extends beyond what is momentary, fleeting, or transitory. [¶] There are different degrees of unconditionality. A threat which may appear conditional on its face can be unconditional under the circumstances. Conditional threats are true threats if their context reasonably conveys to the victim that they are intended. [¶] The word 'immediate' means that degree of seriousness and imminence which is understood by the victim to be attached to the future prospect of the threat being carried out, should the conditions not be met. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A person willfully threatened to commit a crime which if committed would result in death or great bodily injury to another person; [¶] 2. The person who made the threat did so with the specific intent that the statement be taken as a threat; [¶] 3. The threat was contained in a statement that was made verbally, in writing, or by means of an electronic communication device; [¶] 4. The threatening statement on its face, and under the circumstances in which it was made, was so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat; and [¶] 5. The threatening statement caused the person threatened reasonably to be in sustained fear for her own safety or for her immediate family's safety. [¶] It is immaterial whether the person who made the threat actually intended to carry it out."

[6] During deliberations, the jury wrote two notes to the court. One asked whether a letter written by a prisoner would be read by a jail officer before it was mailed. The second indicated the jury wanted, inter alia, a readback of the prosecutor's cross-examination of appellant on the issue of the letter.

threats to Christina A. The claim is unavailing. "'"Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." [Citation.]' [Citations.]" (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1156.) Appellant requested no such language. Accordingly, he waived this issue.

Even if the issue was not waived, the trial court did not err. First, the court instructed on Penal Code section 422 using CALJIC No. 9.94, which set forth the statutory definition of the crime; that was a sufficient instruction on making terrorist threats. (Cf. *People v. Cantrell* (1992) 7 Cal.App.4th 523, 543.)

Second, a trial court is under no duty to give an instruction unsupported by substantial evidence. (Cf. *People v. Tufunga* (1999) 21 Cal.4th 935, 944; *People v. Flannel* (1979) 25 Cal.3d 668, 684.) This is not a case in which a third-party intermediary communicated the letter or its threats to Christina A. Appellant mailed, and Christina A. received, the envelope containing the letter. There was no evidence that the children gave the envelope or letter to Christina A. She opened the envelope, presumably having read it, then read the letter. There was no need for the trial court to instruct on the issue of whether appellant intended the children to convey the letter or its threats to Christina A., because there was no substantial evidence that the children ever conveyed the letter or its threats to Christina A.

Appellant suggests the mere facts that (1) appellant addressed the letter only to the children, (2) his salutations were only for them, and (3) most of the contents of the letter were directed at his children, provide substantial evidence he did not intend the children to convey the threats to Christina A. We reject the suggestion because the addressees on the envelope included the "ALLENS."

Finally, even if the trial court erred by failing to instruct the jury that appellant had to intend the children to convey the threats to Christina A., there is no need to reverse the judgment. First, there was ample evidence that appellant intended to threaten Christina A. directly by having her open the envelope and read the letter, without any involvement of the children in that process. The jury reasonably could have concluded that Christina

A., as a parent, would automatically read any correspondence allegedly addressed to her children, especially where, as here, the record suggests the oldest of the children was 10 years old. Appellant addressed the envelope to the "ALLENS," which necessarily included Christina A.

Appellant himself suggested Christina A. screened any letters to the children when he wrote "*even if your mom does not let you kids read my letter*, I will be out there again." (Italics added.) Moreover, if appellant assumed Christina A. would not let the children read his letter, he must have intended Christina A. to read it. In sum, there was sufficient evidence that appellant intended that Christina A. directly read the threats in the letter without the children acting as intermediaries to convey its contents.

Second, there was ample evidence that appellant intended the children to convey the contents of the letter, including its threats, to Christina A. The jury reasonably could have concluded that appellant wrote the letter knowing, given its contents, that if the young children read the letter, they would give it or convey its contents to Christina A. On three occasions in the letter, appellant told the children to tell their mother something. The jury reasonably could have concluded that many of the things appellant said in the letter would have been unnecessary to say if appellant had intended only that the children read it. Any error in failing to instruct the jury that appellant had to intend that the children convey the threats to Christina A. was harmless. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].)

3. *Sufficient Evidence Supported Appellant's Conviction on Count 7.*

Appellant claims there was insufficient evidence supporting his conviction on count 7 for a violation of Penal Code section 273.6, subdivision (a). Appellant does not dispute that on December 2, 2005, he violated the November 2003 protective order issued pursuant to, inter alia, Penal Code section 136.2. He argues such an order is not an order a violation of which is proscribed by Penal Code section 273.6, subdivision (a). We disagree.

In 2003, when the court issued the protective order, Penal Code section 136.2, subdivision (a) stated, in relevant part, "Upon a good cause belief that harm to, or

intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur, any court with jurisdiction over a criminal matter may issue orders including, but not limited to, the following: [¶] (a) *Any order issued pursuant to Section 6320 of the Family Code.*"[7] (Italics added.)

In 2003, Family Code section 6320, stated, in relevant part: "The court may issue an ex parte order enjoining a party from molesting, attacking, *striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning,* including, but not limited to, *annoying telephone calls* as described in Section 653m of the Penal Code, *destroying personal property, contacting*, either directly or indirectly, by mail or otherwise, *coming within a specified distance* of, or *disturbing the peace* of the other party, . . ." (Italics added.)

The November 2003 protective order in the present case, also entitled an "order post-trial probation condition" stated, in relevant part, as follows: "GOOD CAUSE APPEARING, THE COURT ORDERS[:] 3. The above-named defendant [:] a. must not *annoy, harass, strike, threaten, sexually assault, batter, stalk, destroy personal property of, or otherwise disturb the peace* of the protected persons named below. [¶] . . . [¶] d. must have no personal, telephonic, or written *contact* with the protected persons named below. [¶] . . . [¶] f. must not *come within 100 yards of the protected persons* named below." (Italics added.)

In light of Family Code section 6320 and the language of the November 2003 protective order, we conclude there was sufficient evidence that in 2003, the court, pursuant to Penal Code section 136.2, subdivision (a), issued a protective order the

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[7] As mentioned, the November 2003 order was also issued pursuant to Penal Code section 1203.097, subdivision (a)(2). That subdivision stated: "(a) If a person is granted probation for a crime in which the victim is a person defined in Section 6211 of the Family Code, the terms of probation shall include all of the following: [¶] . . . [¶] (2) A criminal court protective order protecting the victim from further acts of violence, threats, stalking, sexual abuse, and harassment, and, if appropriate, containing residence exclusion or stay-away conditions."

previously italicized portions of which were an "order issued pursuant to Section 6320 of the Family Code" within the meaning of Penal Code section 136.2, subdivision (a).

In 2005, when appellant violated the protective order, Penal Code section 273.6, stated, in relevant part, "(a) Any intentional and knowing violation of a protective order, as defined in Section 6218 of the Family Code, . . . is a misdemeanor . . . . [¶] . . . [¶] (c) Subdivision[] (a) . . . shall apply to the following court order[]: (1) Any order issued pursuant to Section 6320 . . . of the Family Code."

Family Code section 6218 stated, in relevant part, "'Protective order' means an order that includes any of the following restraining orders, whether issued ex parte, after notice and hearing, or in a judgment: [¶] (a) An order described in Section 6320 enjoining specific acts of abuse."

There is no dispute that appellant intentionally and knowingly violated the protective order by engaging in one or more acts previously italicized in the protective order and in Family Code section 6320. To that extent, he intentionally and knowingly violated an "order described in Section 6320 enjoining specific acts of abuse" within the meaning of Family Code section 6218, and therefore a protective order "as defined in Section 6218 of the Family Code" within the meaning of Penal Code section 273.6, subdivision (a). Said order was also a protective order for purposes of Penal Code section 273.6, subdivision (a), because the order was "issued pursuant to Section 6320 . . . of the Family Code" within the meaning of Penal Code section 273.6, subdivisions (a) and (c)(1). We conclude there was sufficient evidence that appellant violated Penal Code section 273.6, subdivision (a), including sufficient evidence that the challenged protective order was an order a violation of which was proscribed by that subdivision. (*People v. Ochoa, supra,* 6 Cal.4th at p. 1206.)[8]

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[8] In light of our conclusion, there is no need to discuss the October 2005 stay-away probation condition imposed after appellant pled no contest to inflicting corporal injury.

4. *No Cunningham Error Occurred When the Court Imposed an Upper Term on Count 1*.

a. *Pertinent Facts.*

The probation report prepared for a May 31, 2006 hearing reflects as follow. In 1999, appellant was convicted of a violation of Penal Code section 148, subdivision (a)(1) and placed on probation for three years. In 2003, appellant was convicted of infliction of corporal injury on a spouse or cohabitant (Pen. Code, § 273.5), and placed on probation for three years. In October 2005, appellant was convicted on two counts of drunk driving (Veh. Code, § 23152, subds. (a) & (b)) and on one count of leaving the scene of an accident (Veh. Code, § 20002, subd. (a)). The court placed him on formal probation for three years. In August 2005, appellant was arrested for, and in October 2005, he was convicted of, infliction of corporal injury on a spouse or cohabitant (Pen. Code, § 273.5, subd. (a)) and the court placed him on formal probation for five years.

The report listed as aggravating factors that appellant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings were numerous or of increasing seriousness, and he was on probation when the crime was committed. The report listed no mitigating factors, indicated the aggravating factors outweighed the mitigating factors, and indicated the court might wish to consider a "high-base term."

At the May 31, 2006 sentencing hearing, the court, which read and considered the probation report, recited the two aggravating factors referred to in the report and noted its reference to the high-base term. As to the first of the two aggravating factors, the court referred to it as the factor that appellant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings were numerous "and" of increasing seriousness, and the court stated, "That certainly is true." The court noted that one of the offenses for which appellant was on probation was spousal battery, a charge similar to that in the present case. The court sentenced appellant to prison for four years four months, including a three-year upper term on count 1.

b. *Analysis.*

Appellant claims the trial court committed *Cunningham* error when the court imposed an upper term on count 1. We disagree. "In *Cunningham* [*v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856, 127 S.Ct. 856,]], the United States Supreme Court, applying principles established in its earlier decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435, 120 S.Ct. 2348] (*Apprendi*) and *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403, 124 S.Ct. 2531] (*Blakely*), concluded that California's [determinate sentence law] does not comply with a defendant's right to a jury trial. '[U]nder the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.' (*Cunningham, supra,* 549 U.S. at pp. ___-___ [127 S.Ct. at pp. 863-864].)" (*People v. Sandoval* (2007) 41 Cal.4th 825, 835 (*Sandoval*).)

The *Sandoval* court later observed, "*Apprendi* stated, 'Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt.' (*Apprendi, supra,* 530 U.S. at p. 490, italics added.)" (*Sandoval, supra,* 41 Cal.4th at p. 835.)

In *Blakely*, the high court concluded that "'the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.' ([*Blakely, supra*, 542 U.S.] at p. 303.)" (*Sandoval, supra*, 41 Cal.4th p. 836.)

In *People v. Black* (2007) 41 Cal.4th 799 (*Black*), our Supreme Court stated: "[W]e agree with the Attorney General's contention that as long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi* and its progeny, any additional factfinding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*Id.* at p. 812.) The court also stated, "so long as a defendant is *eligible* for the upper

term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury." (*Id*. at p. 813.)

Black also stated, "imposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*Black, supra*, 41 Cal.4th at p. 816.)

The United States Supreme Court has recognized an exception to a defendant's Sixth Amendment right to a jury trial on an aggravating fact that renders him or her eligible for a sentence above the statutory maximum. The right to a jury trial and the requirement of proof beyond a reasonable doubt do not apply to the aggravating fact of a prior conviction. (*Sandoval, supra,* 41 Cal.4th at pp. 836-837.) This recidivism exception also applies to the aggravating facts that prior convictions are numerous and of increasing seriousness (*People v. Black, supra,* 41 Cal.4th at pp. 819-820) and a defendant was on probation at the time the current offense was committed. (*People v. Towne* (2008) 44 Cal.4th 63, 71, 76-77, 81-82).

In the present case, the record is clear that the trial court imposed the upper term on count 1 based on the aggravating facts that appellant's prior convictions as an adult

were numerous and of increasing seriousness, and he was on probation when the crime at issue in count 1 was committed. No *Cunningham* error occurred.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**.**

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.